

Third Party Evaluations: When a dispute is between the parent or parents and a third person or agency, it is presumed that the best interests of the child are served by awarding custody to the parent(s). To overcome the parental presumption, the court must find by clear and convincing evidence that the best interests factors indicate that custody should be granted to the third person.

Interpretation:

When a custody dispute arises between a child's parents and a third party,¹ the court must presume that giving one of the natural parents custody is in the child's best interest. Consequently, in order to overcome the presumption in favor of parental custody, it is not sufficient that the evidence is clear and convincing to establish an advantage with the non-parent. Rather, it is necessary to find that, when all of the best interests factors are collectively considered, the third party has established clearly and convincingly that the best interests of the child require custody with the non-parent.² This is true even though there may be an established custodial environment with the third party.³

¹ A third person is anyone other than the child's biological or adoptive parents. However, only certain third parties may bring forward an original action for custody. Those persons are prospective adoptive parents (MCL 722.26c), persons related to the child where the parents did not marry and the custodial parent is dead or missing (MCL 722.26c(1)(b)), and guardians (MCL 722.26b).

² *Eldred v Ziny*, 246 Mich App 142 (2001) (The court found that the third party grandparent met her burden when the child's father had three felony convictions, smoked marijuana regularly, perjured himself and admitted converting his daughter's settlement proceeds.).

³ *Henrikson v Gable*, 162 Mich App 248 (1987). Two lines of cases had developed concerning the competing presumptions. The other line of cases would have the presumption of parental custody and the established custodial environment standards cancel each other out making the custody decision one that is based on a preponderance of evidence. In attempting to resolve the conflict, *Heltzel v Heltzel*, 248 Mich App 1 (2001) found that the recent United States Supreme Court decision in *Troxel v Granville*, 530 US 57; 120 S Ct 2054; 147 L Ed 2nd 49 (2000), required the adoption of the test set forth in the text. See also *Greer v Alexander*, 248 Mich App 259 (2001). For earlier cases see: *Zuziak v Zuziak*, 169 Mich App 741 (1988) (holding that under either a preponderance of the evidence or clear and convincing standard, the third party would prevail but finding that the burden of persuasion was on the mother and not the third party who had an established custodial environment with the child); *Rummelt v Anderson*, 196 Mich App 491 (1992) (establishing a preponderance of the evidence test and placing the

In addition to the presumption in favor of parental custody, public policy considerations also favor returning custody to a parent who voluntarily relinquishes custody to a third party in order to resolve difficulties the parent is having.⁴

NOTE: For more information on changes in custody, please review “Established Custodial Environment” found in Tab B. Third person custody is also addressed in the Michigan Custody Guideline published by the State Court Administrative Office.

Considerations for the Investigator:

- Are there clear and convincing reasons the third party should be granted custody of the child?
- Was the child ever abused (emotionally, physically, sexually, or psychologically) by either or both parents?
- Has either or both parents ever abandoned the child?
- Are there indications of neglect by either or both parents?

Practice Tip: It is necessary to identify clear and convincing reasons a third party should be granted custody over a parent before a recommendation can be made that a third party receive custody.

burden of persuasion on the parent challenging the established custodial environment with the third party); *Glover v McRipley*, 159 Mich App 130 (1987) (using preponderance of the evidence test and placing the burden of persuasion on the parent challenging the established custodial environment with the third party); *Deel v Deel*, 113 Mich App 556 (1982) (stating that each presumption should be recognized equally but not weighted equally and recognizing burden of persuasion with third party); *Bahr v Bahr*, 60 Mich App 354 (1975) (recognizing both presumptions but finding that the presumption in favor of parental custody had been rebutted).

⁴ *Straub v Straub*, 209 Mich App 77 (1995) (finding that the parent had overcome the difficulties and that the parties were otherwise equal).